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No. 94-1210

In The

# Supreme Court of the United States

October Term, 1994

HORN'S POULTRY, INC.,

*Petitioner,*

v.

NORWEST TRANSPORTATION, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether a motor common carrier's failure to adopt tariffs subsequent to changing its name renders those tariffs inapplicable when the Interstate Commerce Commission has approved the change of name, and has not suspended or set aside such tariffs?

## PARTIES TO THE PROCEEDING

Appellee in the United States Court of Appeals for the Seventh Circuit and Respondent herein is Norwest Transportation, Inc. ("Norwest" or "Respondent"), a motor common carrier regulated by the Interstate Commerce Commission.

Appellant in the United States Court of Appeals for the Seventh Circuit and Petitioner herein is Horn's Poultry, Inc. ("Horn's" or "Petitioner"), a shipper in interstate commerce.*

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* Respondent is unaware of any parent or subsidiary companies for the corporations that are parties to this proceeding.

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## REASONS WHY WRIT SHOULD BE DENIED

Horn's Petition seeks reversal based on this Court's decision in *Security Services, Inc. v. Kmart Corporation*, 511 U.S. ___, 128 L.Ed.2d 433 (1994) ("*Kmart*"). Horn's avers that the rationale in *Kmart* is applicable in this matter. Horn's suffers from a fundamental misunderstanding of the issues involved in *Kmart* as applied to this matter. In *Kmart* this Court was presented with an incomplete tariff. The carrier failed to participate in a mileage guide referenced in its tariff, and the void-for-nonparticipation regulations nullified the tariff. *See* 49 C.F.R. § 1312.4(d)(1993) ("[a]bsent effective concurrences or powers of attorney, tariffs are void as a matter of law."). Here, there is no such tariff deficiency, as the Interstate Commerce Commission ("ICC") granted the request of B.J. Xpress to change its name to Norwest. Petitioner relies on a regulation, 49 C.F.R. § 1312.20, that was not at issue in *Kmart*, nor does 49 C.F.R. § 1312.20 provide a remedy, like § 1312.4(d), that voids a tariff if there is noncompliance with the regulation. The decision of the Seventh Circuit followed this Court's precedent and held that an effective tariff not suspended or set aside by the ICC governs the relationship of the parties.

### I. THE SEVENTH CIRCUIT'S DECISION DOES NOT RUN AFOUL OF THIS COURT'S *KMART* DECISION

The Seventh Circuit found that the carrier's failure to amend its tariff to reflect a name change (as ordered by the ICC in boilerplate language) did not invalidate its tariff, especially in light of the fact that the governing

regulation contained no consequence or punishment for noncompliance. The Seventh Circuit stated:

> In *United States v. James Daniel Good Real Property*, 62 U.S.L.W. 4013 (U.S. Dec. 13, 1993), the Supreme Court held that a government forfeiture action filed within the applicable limitation period but not in compliance with other statutory timing requirements, was not subject to dismissal on the latter ground. The Court stated that it had held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanctions." *Id.* at 4019. The Court quoted the statement in *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990), that '[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.'

*Horn's Poultry, Inc. v. Norwest Transportation, Inc.*, 23 F.3d 1151, 1153-54 *reh'g denied*, 37 F.3d 1237, 1994 WL 554655 (7th Cir. 1994) ("Horn's"). The Court of Appeals concluded that Norwest's failure to amend its tariff to present its change of name, and the Commission's conscious "non-action to compel such amendment" did not prevent the enforcement of the tariff in a suit for undercharges. *Horn's*, 23 F.3d at 1154.

The carrier changed its name from B.J. Xpress, Inc. to Norwest Transportation, Inc. in 1987. The ICC in approving the change directed Norwest to amend its insurance filing, designation of agents for service of process and tariffs to reflect the name change. Norwest never amended its tariffs. The Court of Appeals was thus presented with the question

of "whether a filed tariff is valid where the motor carrier has failed to amend the name on the tariff after a change in ownership, but the ICC has not taken any action to suspend or revoke the tariff." *Horn's*, 23 F.3d at 1152. The Court of Appeals' opinion adopted the district court holding that "[u]nless and until suspended or set aside by the Commission, the tariff is the legal rate between the shipper and the carrier for all purposes, . . . since Norwest/B.J. Xpress' tariff had not been suspended or set aside by the ICC, it was the legal rate which Horn's is obligated to pay." *Horn's*, 23 F.3d at 1153.

Affirming the district court, the Seventh Circuit noted that it is clearly within the powers of the ICC to suspend or revoke a carrier's tariff when the carrier fails to comply with a Commission order to amend the tariff to reflect the carrier's new name. Most importantly the Commission had taken no action to suspend or set aside the tariff. The Seventh Circuit noted:

> Although that tariff had been filed by B.J. Xpress and not by Norwest, the latter was merely the new name under which the former carrier operated after the Commission had authorized the name change. Norwest, therefore, was entitled to recover from Horn's the amount necessary to bring the charge into conformity with the tariff on file with the Commission.
>
> There is *no convincing reason* why a deviation from the filed rate should be sanctioned simply because Norwest failed to comply with the Commission's order to amend its tariff to show its new name.

*Horn's*, 23 F.3d at 1153 (emphasis added).

The lack of administrative action taken with respect to Norwest's failure to file an adoption notice was highlighted by the ICC's intervention when Norwest failed to amend its insurance coverage. The Court of Appeals observed:

> Indeed, such administrative action was the course the Commission followed when Norwest failed to amend its insurance coverage to reflect its new name. The Commission instituted four separate proceedings to revoke Norwest's operating authority for this deficiency, which it dismissed after Norwest submitted the requisite evidence of insurance.

*Horn's*, 23 F.3d at 1153. There is simply no reason to allow the shipper to evade the application of the filed tariff rate simply because Norwest "failed to comply" with the Commission's order to amend its tariff. The agency must have been aware of the technical "blemish" and to have acquiesced in its continuance. *See Kmart*, 128 L.Ed.2d at 444; discussion *infra* at p.6.

This Court recognized long ago that a tariff on file with the Commission and never rejected or revoked is binding despite any irregularity in the formalities of tariff filing. *Berwind-White Coal Mining Co. v. Chicago & E.R.*, 235 U.S. 371 (1914). Even "substantive unlawfulness" of the rate will not invalidate a tariff which has been filed and never revoked. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924), *see also, Genstar Chem. Ltd. v. Interstate Commerce Comm'n*, 665 F.2d 1304, 1308 (D.C. Cir. 1981). That Norwest never adopted the tariffs of its predecessor does not mean that there is no tariff on file. Norwest and its customers referred to the tariffs and Norwest rated

shipments according to those tariffs. At best, the tariff was technically deficient in that Norwest had not properly adopted the tariff. More importantly, the ICC has never revoked, set aside or canceled B.J. Xpress' tariffs even though it has taken enforcement steps for other deficiencies. Thus, the tariff remains on file with the Commission and its terms bind the carrier and shipper for the shipments in question.

## II. UNLIKE THE REGULATIONS IN *KMART* THE ICC REGULATIONS GOVERNING ADOPTION OF TARIFFS DO NOT PROVIDE A PENALTY FOR NONCOMPLIANCE

The Commission's regulations regarding the adoption of tariffs subsequent to a change in name do not provide a penalty for failure to comply. The regulations certainly do not provide for voiding of the tariff as a result of a failure to adopt the tariff, and there is no evidence or allegation that the agency had ever taken such an action. The Commission regulation merely provided that adoption should be done "promptly".

In *Kmart* the majority opinion crisply and succinctly held:

> Here, petitioner's tariff reference to the HGCB Mileage Guide became void as a matter of law and its tariff filings incomplete on their face on February 19, 1985, when HGCB canceled its participation in the Mileage Guide by filing a supplemental tariff. The transactions with Kmart occurred after that date.

*Kmart*, 128 L.Ed.2d at 443. As previously stated, the *Kmart* decision found the carrier's tariff rate to be incomplete, as an integral part of the computation of the rate mileage was not present to calculate the appropriate charge.

The *Kmart* decision also distinguished the "technical defect" cases, like the one now before the Court, from its holding. Justice Souter, writing for the majority, stated:

> Unlike the shippers in the "technical defect" cases, the shipper here could not determine the carrier's rates, since under the regulations, distance tariffs are incomplete once the carrier's participation in the Mileage Guide has been canceled by the agent's filing. See 49 CFR §§ 1312.4(d); 1312.10(a); 1312.30 (1993). We are dealing not with a complete tariff subject to some blemish independently remediable, but with an incomplete tariff insufficient to support a reliable calculation of charges.

*Kmart*, 128 L.Ed.2d at 444. Horn's would nullify Norwest's tariff because of a minor, technical deficiency that does not mislead the shipping public. There is *no* confusion about the rates that apply under the tariff as published.

## III. THE 1994 AMENDMENT TO 49 C.F.R. § 1312.20 EVIDENCES A LACK OF A TIMING ELEMENT IN THE REGULATION APPLICABLE HERE

The regulation relied upon in this matter, states:

> (h) *Effective date of adoption publications.*
>
> (1) The effective date of adoption publications is the date the adoption occurs. Adoption publications shall be filed *promptly* and, if possible, prior to the effective date of the publication.

49 C.F.R. § 1312.20(h) (emphasis supplied)

The regulation as amended in 1994, states:

> (h) *Effective date of adoption publications.*
>
> (1) The effective date of adoption publications is the date of consummation of the transaction for which such publications are required. Adoption publications shall be filed promptly and, if possible, prior to their effective date, *but in no case later than 60 days thereafter.*

49 C.F.R. § 1312.20(h) (emphasis supplied)

The regulations *now* allow for a 60 day window within which to file appropriate adoption notices. This was not the case when the transaction between B. J. Xpress and Norwest took place as there was no such referenced time frame. Still the 1994 amended regulation does not provide a self-enforcing remedy for a failure to file adoption notices.

## IV. THE SEVENTH CIRCUIT ADDRESSED *KMART'S* APPLICABILITY IN ITS DECISION DENYING HORN'S PETITION FOR REHEARING

Petitioner raised the identical issue before the Seventh Circuit in a Petition for Rehearing and Suggestion for Rehearing En Banc based on this Court's decision in *Kmart*. The Seventh Circuit found that this Court in *Kmart* reasoned that:

> The filed-rate doctrine was inapplicable in *Kmart* because under the Commission's void-for-noncompliance regulation, the tariff rates the carrier had filed were void, so that there was no filed rate in effect.

37 F.3d at ___, 1994 WL 554655 at *2.

The Seventh Circuit contrasted *Kmart* with the factual circumstances in this matter and stated:

> In the present case, in contrast, there is no Commission regulation providing that a tariff is void when the carrier fails to comply with a Commission order telling the carrier to amend its tariffs to reflect its change in name, and the Commission takes no action to enforce its direction. Such non-action sharply contrasts with the four enforcement proceedings the Commission instituted to compel the carrier to comply with the Commission's directive to amend its insurance coverage, which the carrier did.

37 F.3d at ___, 1994 WL 554655 at *2.

The Seventh Circuit correctly reasoned that the holding in *Kmart* "explicitly tied to the Commission's 'void-for-non-participation' regulation" supplied no grounds for reversal of its earlier decision. 37 F.3d at ___, 1994 WL 554655 at *2.

## CONCLUSION

Because the Panel opinion is correct and the Supreme Court decision in *K-Mart* inapplicable, the Petition for Writ of Certiorari should be denied.

Dated: February 7, 1995.

Respectfully submitted,

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